Supreme Court of the United States

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, ET AL.,

Appellants,

—v.—

JOHN MONTGOMERY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED JULY 7, 1969
PROBABLE JURISDICTION NOTED NOVEMBER 10, 1969

CONTENTS

Item	Page
Relevant Docket Entries in Civ. Nos. 50238 and 50285 (combined list)	1
Complaint in Civ. No. 50238	4
Complaint in Civ. No. 50285	13
Complaint of Intervenors Bell in Civ. No. 50285	23
Motion to Dismiss Complaint and to Dissolve Three Judge Court and Return to Motion for Preliminary Injunction in Civ. Nos. 50238 and 50285	32
Memorandum Opinion	34
Motion to Vacate Memorandum Order and Motion for Rehearing	50
Order Denying Motion to Vacate and Motion for Rehearing	60
Order granting motion of the appellants for leave to proceed in forma pauperis	61
Order noting probable jurisdiction	61

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEWIS v. STARK, Civ. No. 50238

PERCY v. MONTGOMERY, Civ. No. 50285

RELEVANT DOCKET ENTRIES
(Combined List)

Date 1968		PROCEEDINGS
Oct.	31	Filed complaint and issued summons [No. 50238].
	31	Ordered, after statement by counsel for respective parties, the temporary restraining order to issue and case continued to Nov. 12, 1968 at 10 A.M. for further hearing. (Wollenberg) [No. 50238].
Nov.	5	Filed notification and certification for a three judge court. (Wollenberg) [No. 50238].
	8	Filed Order convening three judge court consisting of Judges O. D. Hamlin, Albert C. Wollenberg, Alfonso J. Zirpoli. (Chambers CJ.) [No. 50238].
	12	Ordered, after hearing, the temporary restraining order dissolved and hearing on injunction set for Nov. 26, 1968, at 10 A.M. before three judge court (Wollenberg) [No. 50238].
	12	Filed complaint and issued summons [No. 50285].
	13	Ordered, after hearing, the petition for temporary restraining order denied and case set for hearing before a three judge court on Nov. 26, 1968, at 10 A.M. on injunction [No. 50285].
	13	Filed notification and certification to the Hon. Richard H. Chambers to convene a three judge court (Wollenberg) [No. 50285].
	18	Filed order convening three judge court consisting of Judges O. D. Hamlin, CJ; Albert C. Wollenberg and Alfonso J. Zirpoli, DJ's (Chambers, CJ) [No. 50285].

Date 1968	PROCEEDINGS
Nov. 21	Filed motion by Debra, Julia, Liza and Larry Jacobs to intervene as party plaintiffs, motion for temporary restraining order and preliminary injunction, with affidavit, memorandum and copy of proposed complaint in intervention attached.
21	Filed order that hearing on motion of Debra, Julia, Liza and Larry Jacobs to intervene as party plaintiffs is set for hearing on Tuesday, Nov. 26, 1968, at 10 A.M.; that the motion and all other moving papers shall be served upon counsel for defendants on or before Nov. 21, 1968, at 5 P.M. (Wollenberg).
22	Filed notice and motion by Bertha Bell on behalf of herself and her oldest five minor children, John, Thomas, Patricia, and Rosemarie Bolden, and Alberta Conrad, and Haywood Bell on behalf of himself, for declaratory judgment, temporary restraining order, preliminary injunction and leave to intervene as party plaintiffs, with order shortening time (Wollenberg) and supporting papers attached. (Hearing Nov. 26, 1968, at 10 A.M.)
22	Filed notice and motion by Mary J. Garner, aka Mary J. Garcia on behalf of herself and her minor children, Ennis, Gary, Linda and Richard Garner, and Humberto Garcia on behalf of himself and his minor child, Marion Garcia, for temporary restraining order, preliminary injunction and leave to intervene as plaintiff, with order shortening time (Wollenberg) and supporting papers attached. (Hearing Nov. 26, 1968.)
22	Filed notice and motion by defendants to dismiss and to dissolve three judge court; return to motion for preliminary injunction; memorandum of points and authorities [No. 50238].
22	Filed notice and motion by defendants to dismiss complaint and to dissolve three judge court, return to motion for preliminary injunction, Nov. 26, 1968, at 10 A.M., with order shortening time (Weigel) and supporting papers attached [No. 50285].

Date 1968	PROCEEDINGS
Nov. 26	Ordered, after three judge hearing, case No. 50238 and case No. 50285 are consolidated for this hearing; proposed order be submitted; memoranda to be submitted including all reference material; the motions and the State's motion to join the U.S. stand submitted (Hamlin, CJ; Wollenberg and Zirpoli, DJ's).
Dec. 23	Filed memorandum opinion, dismissing complaint and dissolving the three judge court (Judges Hamlin, Zirpoli and Wollenberg).
1969	
Jan. 2	Filed motion by plaintiffs to vacate memorandum order dismissing complaint and dissolving three judge court and motion for rehearing (to ACW).
10	Filed notice and motion by Wilbur J. Cohen, Secretary of Department of H.E.W. to intervene, Feb. 13, 1969, at 10 A.M., with copy of proposed complaint in intervention, attached.
Mar. 7	Ordered, after hearing on motion for rehearing, motion to vacate order dismissing and motion to intervene, submitted (Wollenberg).
12	Filed order denying motion to vacate memorandum order dismissing complaint and dissolving three judge court and motion for rehearing (Hamlin, Wollenberg and Zirpoli).
12	Filed order denying motion to intervene as to Wilbur J. Cohen (Hamlin, Wollenberg and Zirpoli).
May 8	Filed plaintiffs' joint notice of appeal to Supreme Court of the United States.
8	Filed plaintiffs' request for certification and transmission of record to the Supreme Court of the United States.
June 11	Made, mailed Record on Appeal to Supreme Court of United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 50238

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, PLAINTIFF

vs.

PAULINE STARK, SUSAN GOODFELLOW; HRAYR TERZIAN; JOHN C. MONTGOMERY; ALAMEDA COUNTY WELFARE DEPARTMENT; STATE DEPARTMENT OF SOCIAL WELFARE; STATE OF CALIFORNIA, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff alleges:

I

This action arises under the Act of April 20, 1871, 17 Stat. 13, U.S.C. Title 42, Sec. 1983, as hereinafter more fully appears. It arises also under the Constitution of the United States, Article VI, Sec. 2, under the First, Ninth and Section 1 of the Fourteenth Amendments to the Constitution of the United States, and under the Act of 1935, 49 Stat. 627, U.S.C. Title 42, Secs. 601, 602 and 606 as hereinafter more fully appears. The matter in controversy between defendants and the class represented by plaintiff exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

II

This action seeks to declare void and to enjoin operation of a state statute and an administrative regulation on the grounds that their enforcement will deprive plaintiff and her dependent children right, privileges and immunities secured by the Constitution and laws of the

United States. Jurisdiction is vested in this Court by U.S.C. Title 28, Secs. 1331(a), 1343(3) and 1343(4) and insofar as declaratory relief is sought, under U.S.C. Title 28, Secs. 2201 and 2202.

III

Plaintiff is a citizen of the United States. She is the mother and general guardian of two minor children, ANNETTE LEWIS and MANUEL LEWIS, who are citizens of the United States and reside with plaintiff in the City of Berkeley, County of Alameda, State of California. All are recipients of federal aid to families with dependent children (AFDC). Plaintiff brings this action on behalf of said children and in her own right as a responsible relative entitled under U.S.C. Title 42, Sec. 606(b) to receive AFDC.

IV

Plaintiff brings this action also on behalf of each California recipient of AFDC whose aid payments have been or are about to be reduced by defendants or any of them in amounts calculated from the income of any person who is neither the parent or adoptive stepparent of the dependent child nor the spouse of the mother, without proof that such income is actually available to such recipient. The members of the class are too numerous practically to be joined. Plaintiff's claim is typical of the claims of the class. There are questions of law and fact common to the class, and such common questions predominate over any questions which may affect only individual members of the class. There is no other means available to the class so fair and efficient for adjudicating the controversy as maintenance of this action. Prosecution of this action by plaintiff fairly and adequately protects the interests of the class.

V

Defendants PAULINE STARK and SUSAN GOODFELLOW are social workers employed by defendant ALAMEDA COUNTY WELFARE DEPARTMENT

(hereinafter "COUNTY WELFARE"). Their duties as social workers include computation of the amount of payment to be made to plaintiff as AFDC. Defendant HRAYR TERZIAN is Director of defendant COUNTY WELFARE, and by virtue of that position is responsible for supervision and direction of the performance of their duties by defendants PAULINE STARK and SUSAN GOODFELLOW. Defendant COUNTY WELFARE is an agency of the County of Alameda. The County of Alameda is a political subdivision of defendant STATE OF CALIFORNIA, which is a sovereign member o. the United States, and a State within the meaning of the federal Constitution and of Title 42 of the United States Code. Defendant STATE DEPARTMENT OF SOCIAL WELFARE (hereinafter "STATE WELFARE") is an agency of defendant STATE OF CALIFORNIA, empowered by California law to administer the computation and distribution of AFDC in California, and for that purpose to create regulations of state-wide application having the force of statutory law. Defendant JOHN C. MONTGOMERY is Director of defendant STATE WELFARE, and by virtue of that position is responsible for the execution of the powers of STATE WELFARE.

VI

Defendants and each of them have at all times herein mentioned been engaged in the distribution of AFDC under the federal Social Security Act, U.S.C. Title 42, Secs. 601-610, inclusive. Between June 30, 1968 and the present, plaintiff received such aid from defendants in the amounts shown below.

Month	Family Need as Computed by Defendants	AFDC Payment (State Maximum)
July	$224	$172
August	$199	$172
September	$199	$172
October	$199	$172
November	$199	——

VII

On October 24, 1968, defendant PAULINE STARK stated under oath at a hearing held at the offices of defendant COUNTY WELFARE that she will reduce plaintiff's AFDC payment for November, 1968 to $118.45. On October 29, 1968 one Elaine B. Neel, supervisor of administrative appeals for defendant COUNTY WELFARE stated that plaintiff's AFDC payment for November, 1968 will be so reduced, notwithstanding the fact that plaintiff had filed an administrative appeal. On October 29, 1968, one Margaret Leonard, an attorney for defendant COUNTY WELFARE stated that the AFDC payment to plaintiff for November, 1968 will be so reduced, and that said reduction is correct under State law. Unless enjoined, defendants will reduce plaintiff's AFDC grant by $53.55 for November, 1968, beginning with the payment due November 1, 1968. The actual need of plaintiff's family for AFDC will not decline for November, 1968.

VIII

The reduction of AFDC benefits threatened by defendants is due soley to their administrative determination that income of one Mr. Watson in excess of his personal needs is income to plaintiff and her children. Plaintiff is entitled to, and but for said determination would receive, not less than $172.00 as AFDC for November, 1968. Said determination was made arbitrarily and capriciously, without considering or giving plaintiff any opportunity to present contrary evidence. Said determination will operate to reduce plaintiff's AFDC benefits for November, 1968 and indefinitely thereafter as the direct result of the application and under color of a state-wide regulation, Public Social Services Manual, Sec. 44-133.5, created by defendant STATE WELFARE, which provides:

> The amount the . . . man assuming the role of spouse is able to contribute to the AFDC family is net income to the FBU [family budget unit].

Said regulation is authorized by a California statute, Welfare & Institutions Code Sec. 11351, which provides that where a needy child lives with his mother and an adult male assuming the role of spouse to her, the amount of the AFDC grant:

> shall be computed after consideration is given to the income of . . . such adult male person. The county granting aid shall determine if . . . such adult male person is able to support the child either wholly or in part. . . .

Defendants' administrative determination that Mr. Watson is "assuming the role of spouse" was made soley on the grounds that he lives with plaintiff and her needy children. Defendants' administrative determination that plaintiff and said children are receiving "net income" from Mr. Watson was made soley on the grounds that he should be "able" to contribute to the family on the basis of a formula computation of his personal needs, pursuant to the statute and regulation hereinabove complained of. No defendant has produced or considered any evidence that Mr. Watson has assumed any financial obligation of the family or has contributed to the support of any member of the family, or will so contribute, or has married plaintiff, or has adopted any of her children. Defendants have at all times refused to consider any evidence to the contrary.

IX

Mr. Watson is not married to plaintiff and has adopted none of her children. The money from his income presumed by defendants to be available to plaintiff and her children is in fact not available.

X

On September 16, 1968, shortly after she was informed by a social worker for defendant COUNTY WELFARE that Mr. Watson's income would be considered income to her family, plaintiff requested a formal administrative hearing. The hearing was had on October 24, 1968,

before one William T. Coughlin, a referee for defendant STATE WELFARE, who declared that review would be confined to the accuracy of computations under the State regulation. Neither that hearing, nor any review procedure based upon it, nor any other administrative remedy will permit plaintiff to show that the income presumed to be received by her and her children is actually fictitious, or that the statute and regulation by whose operation her AFDC payment will be reduced are in conflict with federal law, or any issue other than conformity of the threatened reduction with State law. Defendants have refused to stay reduction of plaintiff's AFDC payment. There is no adequate or speedy remedy at law by which plaintiff can obtain relief.

XI

Plaintiff and her children are destitute, except for AFDC. They need every dollar of their $172.00 monthly grant, although that amount is itself insufficient to meet all their actual needs. If the grant is reduced, plaintiff and her children will be deprived of necessaries of life. Subsequent correction of the grant will not repair the harm caused by such deprivation.

XII

Defendants and each of them are aware that the threatened reduction of plaintiff's AFDC is contrary to the provisions of federal law made and provided to deal with deductions based on income to a "man assuming the role of spouse." Since August, 1968, defendants have been on notice of the provisions of 42 C.F.R. Sec. 203.1 (Exhibit A attached hereto), and have wilfully and maliciously elected not to comply.

WHEREFORE PLAINTIFF RESPECTFULLY PRAYS:

1. That this Court temporarily restrain defendants and each of them from deducting from plaintiff's AFDC payment any amount representing the income of any

person other than plaintiff or her children, unless such income be actually contributed to their support.

2. That this Court enter its Order that plaintiff's action is to be maintained as a class action and direct actual notice to each member of the class.

3. That this Court convene a three-judge panel pursuant to U.S.C. Title 28, Secs. 2281 and 2284.

4. That the Court enter a preliminary injunction, to become final upon determination of this action, restraining defendants and each of them from deducting from any AFDC payment a sum based on income of any person other than the recipient, the needy children, the spouse of the recipient, or the natural or adoptive parent of the needy children, unless such income be actually contributed to the support of the recipient family.

5. That the Court declare that California Welfare & Institutions Code Sec. 11351 and California Public Social Services Manual Sec. 44-133.5 are null and void, and of no effect insofar as they purport to authorize such deductions.

6. That the Court award plaintiff attorney's fees.

7. That the Court grant such other relief as it deems just and proper.

Dated this 30th day of October, 1968.

CAROL RUTH SILVER
R. CORBIN HOUCHINS
ELIZABETH A. TPUNINGER

By

R. CORBIN HOUCHINS
Attorneys for Plaintiff

[Notarized Verification of Genever Lewis omitted in printing.]

EXHIBIT A (to Complaint in Civ. No. 50238)

HEW REGULATION, 45 CODE OF FEDERAL REGULATIONS, SECTION 203.1

Sec. 203.1. Condition of plan approval: bases for determining eligibility of child.

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

(c) Any State whose past policies and procedures with respect to the determination referred to in para-

graph (a) of this section have been inconsistent with the provision in paragraph (a) or (b) of this section must provide effective methods for giving notice of its present policies and procedures to former and potential applicants for and recipients of AFDC and to other interested persons. The methods which the State agency proposes to meet this notice requirement must be submitted to and be approved by the Regional Commissioner, SRS, DHEW. In addition, where the records of the State agency permit identification of persons whose cases have been terminated or applications denied at any time within the past 2 years by reason of such inconsistent policies or procedures, the State agency must give prompt written notification to such persons concerning the change in such policies or procedures. Such notification must be given within 90 days of publication of the regulations in this part and must explain clearly the rights which such persons have under the regulations in this part.

(Sec. 1102, 49 Stat. 647, Sec. 402, 49 Stat. 627; 42 U.S.C. 1302, 602).

Effective date. The regulations in this part shall be effective on the date of their publication in the *Federal Register*.

[Published on August 8, 1968, at 33 Fed. Reg., No. 154, 11290.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 50285

MARGARET PERCY, individually and on behalf of her minor child, CLEA PERCY, and on behalf of all other individuals similarly situated,

and

MELVIN JONES, individually and on behalf of all other individuals similarly situated, PLAINTIFFS

—*vs*—

JOHN MONTGOMERY, as Director of the State Department of Social Welfare of the State of California, and the STATE DEPARTMENT OF SOCIAL WELFARE; H. D. CHOPE, as Director of the San Mateo County Department of Public Health and Welfare (DPHW), ROBERT D. RIPPETO, as Superintendent of the Social Service Division of the San Mateo County DPHW, ANNA DOBSON and ELLEN HARTY, as employees of the Social Service Division of the San Mateo County DPHW, and the SAN MATEO COUNTY DEPARTMENT OF PUBLIC HEALTH AND WELFARE; STATE OF CALIFORNIA, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND SUMS DUE AND OWING

1. This is an action on behalf of plaintiffs and all others similarly situated for declaratory and injunctive relief authorized by Title 42, U.S.C., § 1983, to secure rights, privileges and immunities guaranteed by Article IV, Paragraph 2, and the Third, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Sections 11 and 21 of the Constitution of the State of California, and by Title IV of the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C.

§§ 601, 602 and 606, and the regulations promulgated thereunder, as set forth in 33 C.F.R., Section 203.1 (See Exhibit A attached hereto).

2. Jurisdiction is conferred on this Court by Title 28, U.S.C., §§ 1343(3) and (4), providing for original jurisdiction of this Court in suits authorized by Title 42, U.S.C., § 1983, and under Title 28, U.S.C., §§ 2201 and 2202, relating to declaratory judgments.

Jurisdiction is further founded on Title 28, U.S.C., § 1331(a), providing for original jurisdiction of this Court in all civil actions wherein the matter in controversy arises under the Constitution and laws of the United States. The matter in controversy between defendants and the class represented by plaintiffs exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

3. This is a proper case for determination by a three-judge court pursuant to Title 28, U.S.C., §§ 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Section 11351 of the California Welfare and Institutions Code (annexed hereto as Exhibit B) and Public Social Services Manual, §§ 42-535 and 44-133.5 (annexed hereto as Exhibit C), for the reason that said statute and regulations are in violation of the provisions of the Social Security Act and the regulations promulgated by the United States Department of Health, Education, and Welfare, and are invalid under the United States and California constitutions.

4. Plaintiff MARGARET PERCY is an adult citizen of the United States. She is the mother and general guardian of her minor child, CLEA PERCY, who is a citizen of the United States and resides with her mother in the County of San Mateo, State of California. Plaintiff MARGARET PERCY brings this action in behalf of said child and in her own right as a responsible relative entitled under Title 42, U.S.C., § 606(b), to receive Aid to Families with Dependent Children (AFDC).

5. Plaintiff MELVIN JONES is an adult citizen of the United States. He resides in the County of San

Mateo, State of California, in the same household as plaintiffs PERCY.

6. Plaintiffs also bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons similarly situated within the State of California. Two distinct classes exist:

(1) Plaintiffs CLEA and MARGARET PERCY represent those dependent children and their mothers who are eligible for and in need of AFDC benefits, but who do not receive such benefits because defendants consider income of a man residing in the household as available to meet plaintiffs' needs despite the facts that such person is neither the parent nor adoptive parent of the dependent child and does not represent himself to be the parent of that child, that such person is not the spouse of the mother, and that such income is not actually available to the dependent child and her mother.

(2) Plaintiff MELVIN JONES represents those persons who reside with the patents of needy children, receiving or applying for AFDC benefits, but who owe no legal duty of support to those children under the law of general applicability in the State of California.

The members of both classes are sufficiently numerous that joinder of all members is impracticable. There are questions of law and fact common to the respective classes. The claims of the respective representative parties are typical of the claims of their classes. There is no other means available to the classes so fair and efficient for adjudicating the controversy as maintenance of this action. The representative parties will fairly and adequately protect the interests of their respective classes.

7. Defendant STATE OF CALIFORNIA is a sovereign member of the United States, and a State within the meaning of the Federal Constitution and of Title 42 of the United States Code. Defendant STATE DEPARTMENT OF SOCIAL WELFARE (hereinafter "SDSW") is an agency of defendant STATE OF CALIFORNIA, empowered by California law to administer the computation and distribution of AFDC in California, and for that purpose to create regulations of state-wide application having the force of statutory law. Defendant

JOHN C. MONTGOMERY is Director of defendant SDSW, and by virtue of that position is responsible for the execution of the powers of SDSW.

8. Defendant H. D. CHOPE, as the Director of defendant SAN MATEO COUNTY DEPARTMENT OF PUBLIC HEALTH AND WELFARE (DPHW), and ROBERT D. RIPPETO, as the Superintendent of the San Mateo County DPHW, are responsible for the administration of the AFDC program in the County of San Mateo. Defendants ANNA DOBSON and ELLEN HARTY are social workers employed by defendant DPHW, whose duties as social workers include the determination of eligibility of applicants for the AFDC program. Defendant DPHW, as an agency of the County of San Mateo, a political subdivision of defendant STATE OF CALIFORNIA, is authorized by law to implement and administer the AFDC program within said county.

9. Defendants and each of them have at all times herein mentioned been engaged in the administration of the AFDC program under the Social Security Act, Title 42, U.S.C., Sections 601-610, inclusive. On or about October 8, 1968, plaintiff, MARGARET PERCY, on behalf of her daughter, CLEA PERCY, attempted to make application for AFDC benefits. Plaintiff PERCY was told by defendant DOBSON that such an application for AFDC benefits would be to no avail. Defendant DOBSON acted pursuant to, and under color of, state-wide regulations promulgated by defendants SDSW and MONTGOMERY under the California Welfare and Institutions Code, Section 11351 (set forth in full in Exhibit B) attached hereto).

10. Specifically, defendants denied AFDC benefits to plaintiffs PERCY under Public Social Services Manual (PSSM), Sections 42-535 et. seq. (set forth in Exhibit C attached hereto), which provide, in relevant part, that a man alleged to be assuming the role of spouse to a mother of children applying for AFDC benefits "is responsible for the support of . . . [t]o the extent of his ability, the mother and her needy children." PSSM, § 42-535.22.

PSSM, § 44-133.5 (Exhibit C attached hereto) requires the inclusion of the entire net income of a man alleged to be assuming the role of spouse as income assumed

available to meet the needs of the mother and her needy children except for the limited deductions permitted according to assistance standards as set forth in PSSM, § 44-113.

11. Effective August 8, 1968, the Secretary of Health, Education, and Welfare (HEW) made applicable to states receiving federal grants-in-aid for AFDC programs revised regulations regarding stepfather and "man-in-the-house" policies. [See Exhibit A attached hereto.]

Said regulations rendered invalid stepfather and man-in-the-house budgetary rules which impute income to recipients of or applicants for AFDC benefits unless that income is available *in fact*, except where a state law of general applicability imposes a legal duty to support those needy children upon the stepfather or man-in-the-house.

12. On or about October 11, 1968, plaintiff MARGARET PERCY renewed her application to defendant DPHW for AFDC benefits on behalf of her minor needy child, CLEA PERCY, on the advice of her attorneys that defendants' regulations and Section 11351 were unconstitutional and in direct violation of federal law, because there was no law of general applicability imposing any support duty upon plaintiff JONES. Subsequent to that application, plaintiffs and their attorneys spoke on numerous occasions with defendants DOBSON and HARTY advising them of the invalidity of the existing budgetary rules. Nevertheless, on or about November 6, 1968, the application was denied due to defendants' determination that the income from the employment of plaintiff JONES sufficiently meets the needs of, and is deemed available to plaintiffs MARGARET and CLEA PERCY. [A copy of the letter of denial is attached hereto as Exhibit D.] The needs of MARGARET and CLEA PERCY amount to $192.00 per month according to the standards of defendant SDSW.

13. Plaintiff JONES' ability to support is determined solely from the fact that his net income meets the needs of MARGARET and CLEA PERCY, according to the computations by defendants made pursuant to the statute and regulations hereinabove complained of. Defendants' computations operate on the conclusive presumption that the expenses of plaintiff JONES are limited to the public

assistance standards established for determining the expenses of welfare recipients. Defendants refuse to consider evidence showing that Mr. Jones is in fact financially obligated for expenses beyond those recognized by defendants' standards. Plaintiff JONES earns approximately $370 per month and has current expenses approximating $400 per month.

Defendants' administrative finding that Mr. Jones is "assuming the role of spouse" was made solely on the grounds that he lives in the same household with plaintiff and her needy child. No defendant has produced any evidence that Mr. Jones has assumed substantial financial responsibility for the family or that he has adopted the minor child or in any fashion assumed a parental role toward that child. Defendants have at all times refused to consider evidence to the contrary.

14. Plaintiff JONES is not married to plaintiff MARGARET PERCY and has not adopted CLEA PERCY. The money from plaintiff JONES' income presumed to be available to the PERCY family is not in fact available, except that due to the emergency situation created by defendants' refusal to grant AFDC benefits to plaintiffs PERCY, and in disregard of pressing personal needs and the just demands of his creditors, plaintiff JONES has provided food and shelter to the PERCY family. Plaintiff JONES cannot continue to provide for the needs of plaintiffs PERCY and will terminate all support for them as soon as they are found eligible for the AFDC program.

FOR A FIRST CLAIM

15. By reason of the refusal of defendants to grant those individuals represented by plaintiffs PERCY herein that amount of AFDC benefits to which they are otherwise entitled, those plaintiffs are denied their legal rights in that:

(1) The Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., § 601, 602 and 606, requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits

the discrimination effected by defendants in treating that class represented by named plaintiffs herein differently from needy children who live: (a) alone with their mother and whose mother has no such relationship with any man in or out of the house; (b) alone with their mother and whose mother has such a relationship with a man not living in the house; or (c) with their mother and a man whose income is considered sufficient only for his own needs.

16. Plaintiffs PERCY allege that they and the class they represent are now suffering and will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSSM §§ 42-535 et seq., 44-133.5 in the manner set forth above, in that they will be denied benefits to which they are otherwise entitled under federal and California law at a time when they are urgently in need of such assistance. Plaintiffs PERCY have stood at all times mentioned herein, and do presently stand, ready to prove that they are without adequate resources with which to live. Plaintiffs further stood, and presently stand, ready and willing to cooperate with all reasonable and lawful requests of defendants and their agents.

17. Plaintiffs have no plain, adequate or speedy remedy at law to obtain such aid and services as they are entitled to receive, and this suit for injunction is their only means of securing such relief.

18. The enforcement of Welfare and Institutions Code, Section 11351 and the regulations implementing that section has deprived plaintiffs PERCY of benefits to which they would be otherwise entitled for the month of October, 1968, in the sum of One Hundred and Forty-Eight Dollars ($148.00), and for the month of November, 1968, in the sum of One Hundred and Forty-Eight Dollars ($148.00).

19. The continued enforcement of said provisions will deprive plaintiffs PERCY of aid and services for which they otherwise qualify in the amount of One Hundred and Forty-Eight Dollars ($148.00) monthly.

20. By reason of the continued denial by defendants and their agents, acting pursuant to said provisions, of

aid and services to plaintiffs PERCY for which they are otherwise entitled, and of which they have urgent and desperate need, said plaintiffs have been and will continue to be severely injured, in a sum not presently ascertainable. Plaintiffs ask leave to amend this complaint at a later date to state the exact amount of such damage.

FOR A SECOND CLAIM

21. Plaintiffs refer to Paragraphs 1 through 14 inclusive and Paragraph 17 and incorporate the same herein by reference as if set out at length.

22. By reason of defendants' actions, as set out more fully above, plaintiff JONES has been denied his legal rights in that:

(1) The Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602, and 606 requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) The equal protection clauses of the Constitution of the United States and the State of California prohibit the discrimination effected by defendants in imposing upon that class represented by plaintiff JONES a greater duty of support than that required of other men similarly situated but for the fact that the woman with whom they are residing has no needy children who are applicants for AFDC benefits;

(3) The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the taking of plaintiff JONES' property on the basis of a conclusive and factually inaccurate presumption.

23. Plaintiff JONES alleges that he and the class he represents will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSSM, § 42.535 et seq., in the manner set forth above, in that defendants' actions serve to deprive plaintiffs of their property by considering, as available to persons for whom plaintiffs have no legal responsibility, income which is in fact sufficient only for plaintiffs' personal expenses. Plaintiff JONES stood at all times mentioned herein, and presently stands, ready to prove that he is not able to make available to plaintiffs PERCY that

amount of income deemed available by defendants, irrespective of the contributions of shelter and food he has made for the PERCY family during their emergency.

FOR A THIRD CLAIM

24. Plaintiffs refer to Paragraphs 1 through 14 inclusive, Paragraphs 16 through 21 inclusive, and Paragraph 23 and incorporate the same herein by reference as if set out at length.

25. By reason of defendants' actions, as set out more fully above, plaintiffs JONES and PERCY have been denied those rights of privacy and repose arising under the Third, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and are unlawfully forced to surrender their constitutional rights as a condition to the eligibility for AFDC benefits of CLEA PERCY, a needy child and minor plaintiff herein.

WHEREFORE, plaintiffs respectfully pray this Court to:

1. Convene a special three-judge court as provided by Title 28, U.S.C., §§ 2281 and 2284 for hearing this claim.

2. Enter its Order that plaintiffs' action is to be maintained as a class action and direct actual notice to each member of the two classes set forth above.

3. Issue an Order temporarily restraining defendants, their successors in office, agents and employees, from denying to plaintiffs PERCY and the members of the class they represent, the aid and benefits to which they would be entitled but for the provisions of Section 11351 of the California Welfare and Institutions Code and PSSM Sections 42-535 et seq., and 44-133.5, and from enforcing said provisions against plaintiffs and the classes they represent.

Plaintiffs further respectfully pray the three judge court, when convened, to:

1. Enter a declaratory judgment declaring that Section 11351 of the Welfare and Institutions Code and the PSSM regulations promulgated thereunder, are unconstitutional on their face and as applied, and contrary to the

Social Security Act and regulations promulgated thereunder;

2. Enter a preliminary injunction, and thereafter a permanent injunction:

(a) enjoining defendants, their successors in office, agents and employees, from continuing to enforce Section 11351 and the regulations promulgated thereunder against plaintiffs and the classes they represent;

(b) directing defendants to send or instruct county welfare departments to send written notice to the last known address of all members of that class represented by plaintiffs PERCY, who applied for AFDC aid and services but were rejected, or who received aid in a reduced amount because of Section 11351 and regulations thereunder;

(c) directing defendants to award to plaintiffs PERCY and all other persons wrongfully denied AFDC assistance pursuant to Section 11351 all monies withheld from the date of their original application or attempted application.

3. Award plaintiffs costs of this suit;

4. Grant such further, other or alternative relief as may appear to the court to be just and proper.

Dated: November 12, 1968.

RUBIN TEPPER
MICHAEL H. WEISS
BRUCE A. BAILEY

By /s/ RUBIN TEPPER
RUBIN TEPPER

Attorneys for Plaintiffs
2221 Broadway
Redwood City, California 94063
Telephone: (415) 365-3535

[Notarized Verification of Margaret Percy and Melvin Jones omitted in printing.]

[Exhibits A through D omitted in printing.]

Complaint of Intervenors Bell in Civ. No. 50285

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

I

Margaret Percy, Clea Percy and Melvin Jones, the original plaintiffs herein, filed their complaint on November 12, 1968, against John C. Montgomery, as Director of the State Department of Social Welfare of the State of California; the State Department of Social Welfare; H. D. Chope, as Director of the San Mateo County Department of Public Health and Welfare (DPHW); Robert D. Rippeto, as Superintendent of the Social Service Division of the San Mateo County DPHW; Anna Dobson and Ellen Harty, as employees of the Social Service Division of the San Mateo County DPHW; and the San Mateo County Department of Public Health and Welfare, State of California, defendants, seeking a declaratory judgment, sums due and owing, and preliminary and permanent injunction restraining the enforcement of and declaring unconstitutional California Welfare and Institutions Code, Section 11351, and the regulations promulgated thereunder [annexed to the original complaint as Exhibits B and C]. Plaintiffs' action is based on the fact that these statutes and regulations on their face and as applied result in the denial, reduction, or termination of Aid to Families with Dependent Children (AFDC) public assistance to needy children otherwise eligible for aid on the basis of income assumed by defendants to be available from a nonlegally responsible man residing with said needy children's mother. Plaintiffs' action is brought on the grounds that said statutes and regulations, and the actions taken pursuant thereto, deny plaintiffs their rights guaranteed by Article IV, Paragraph 2, and the Third, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 11 and 21 of the Consti-

tution of the State of California, and by Title IV of the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602 and 606, and the regulations of the United States Department of Health, Education, and Welfare (HEW) promulgated thereunder, as set forth in 33 C.F.R., Section 203.1 (annexed to the original complaint as Exhibit A).

II

On November 13, 1968, a hearing was held on plaintiffs' motion for a temporary restraining order and application for the convening of a three-judge court pursuant to Title 28, U.S.C., §§ 2281 and 2284. Plaintiffs' motion for a temporary restraining order was denied. On November 13, 1968, the Honorable Albert C. Wollenberg, District Judge, signed an order certifying to the Chief Judge of the Ninth Circuit Court of Appeals that the questions presented required the convening of a three-judge district court. Said three-judge court was convened and the matter is scheduled for hearing by said Court on November 26, 1968, at 10:00 a.m.

III

Bertha Bell, on behalf of herself and her five minor children, John, Thomas, Patricia, Rosemarie Bolden and Alberta Conrad, and Haywood Bell, on behalf of himself, intervenors, allege that:

(A) Intervenor Bertha Bell is an adult citizen of the United States. She is the mother and general guardian of her five minor children, John Bolden, age 16, Thomas Bolden, age 15, Patricia Bolden, age 14, Rosemarie Bolden, age 12, and Alberta Conrad, age 10, who are citizens of the United States and who reside with her in the City and County of San Francisco. Bertha Bell brings this action on behalf of herself and her said minor children.

(B) Intervenor Haywood Bell is an adult citizen of the United States and resides in the City and County of San Francisco, State of California. Haywood Bell brings this action on behalf of himself.

(C) Defendant Ronald H. Born (Born) is the General Manager of the San Francisco County Department of Social Services (County Department) and is responsible for the administration of the AFDC program in the City and County of San Francisco.

(D) On July 7, 1967, Bertha Bell and intervenor Haywood Bell were married. They are the parents of Cynthia Bell, a minor child.

(E) Mr. Bell has not adopted the Bolden children or Alberta Conrad and has not received them into his family.

(F) From the Bells' marriage to the present and during the time Mr. Bell has been residing with Mrs. Bell, defendants have granted, reduced, or terminated AFDC payments to the Bolden children and Alberta Conrad solely on the basis of the amount of Mr. Bell's net income. Defendants' actions have been based on California Welfare and Institutions Code, Section 11351, and public Social Services Manual (PSS), Sections 42-535, *et seq.*, and 44-133.5 (annexed to the original complaint as Exhibit C).

(G) Intervenor Bertha Bell requested a fair hearing before the State Department of Social Welfare to contest the denial and reduction of aid to the Bolden Children and Alberta Conrad. The fair hearing was completed before a state referee on May 14, 1968. To date, six months after the hearing, no decision has been rendered.

(H) During the months of April, May, June, July, August and September 1968, no AFDC payments were made for Mrs. Bell's five oldest minor children.

(I) The money from Haywood Bell's income presumed to be available to the Bolden children and Alberta Conrad was not, in fact, available except that due to the emergency situation created by the failure of defendants to provide said Bolden children and Conrad child with public assistance, Haywood Bell did provide limited food and shelter for them. In order that the burden of supporting the Bolden children and Conrad child be lifted from Haywood Bell and that said children could receive the AFDC assistance they are properly entitled to, Haywood and Bertha Bell were forced to separate and to assume separate residency in October 1968.

(J) Effective August 8, 1968, the Secretary of HEW made applicable to states receiving Federal grants-in-aid for AFDC programs revised regulations regarding stepfather and "man-in-the house" policies. Said regulations render illegal stepfather and man-in-the house budgetary rules which impute income to recipients of, or applicants for, AFDC benefits unless that income is available, *in fact*, except where a state law of general applicability imposes a legal duty to support those needy children upon the stepfather or man-in-the house.

(K) California Civil Code, § 209, provides that a husband is not bound to maintain his wife's children by a former husband.

(L) On or about August 28, 1968, Mrs. Bell reapplied to the San Francisco County Department for AFDC payments for the Bolden children and Alberta Conrad. Mrs. Bell submitted a declaration from Mr. Bell [attached hereto as Exhibit A and incorporated herein as if set forth in full] and the regulations of the United States Department of Health, Education, and Welfare regarding state welfare stepfather policies. 33 C.F.R., Section 203.1 (annexed to the original complain as Exhibit A). This application was denied on the basis of Mr. Bell's defendants' assumption that Mr. Bell's net income was available to support said children.

(M) On October 3, 1968, Mr. Bell lost his job and he and Mrs. Bell applied for public assistance for the family. They were given a food order of $104 and $240 grant for October.

(N) A week later Mr. Bell found a new job and the family again faced the prospect of losing its public assistance grant by reason of defendants' assumption that Mr. Bell's earnings from this job would be income available to Mrs. Bell and her oldest five minor children.

(O) On October 16, 1968, Mr. Bell left his wife's residence and has since that date lived with his mother. He has agreed to send Mrs. Bell $50 per month for the support of his child Cynthia Bell.

(P) By reason of Mr. Bell's departure from the home, the four Bolden children and Alberta Conrad are now receiving AFDC benefits but at the severe cost of losing

the only adult male figure in the household. This deprivation has caused and will continue to cause severe psychological and emotion on these minor children, especially on the two eldest sons of Mrs. Bell, John Bolden, age 16, and Thomas Bolden, age 15.

(Q) By defendants' denial of aid and services to intervenor Bolden children and Alberta Conrad from April through September 1968, to which they were otherwise entitled, said intervenors have been severely injured, in a sum not presently ascertainable. Intervenors ask leave to amend this complaint at a later date to state the exact amount of such damage.

(R) By reason of defendants' actions, as set out more fully above, intervenor Haywood Bell has been denied his legal rights in that:

(1) the Social Security Act of 1935, 49 Stat. 627, Title 42, U.S.C., §§ 601, 602, and 606, requires state welfare departments to conform to the requirements of federal law and the regulations of HEW;

(2) the equal protection clauses of the Constitution of the United States and the State of California prohibit the discrimination effected by defendants in imposing upon intervenor Haywood Bell a greater duty of support when he is residing with his wife than required of other men similarly situated but for the fact that the women with whom they are residing have no needy children who are applicants for AFDC benefits; and

(3) the due process clause of the Fourteenth Amendment to the United States Constitution prohibits the taking of intervenor Haywood Bell's property on the basis of a conclusive and factually inaccurate presumption.

(S) Intervenor Haywood Bell alleges that he will continue to suffer irreparable injury and deprivation by reason of defendants' enforcement of Section 11351 and PSS, §§ 42.535, *et seq.*, in the manner set forth above, in that defendants' actions serve to deprive plaintiffs of their property by considering, as available to persons for whom Mr. Bell has no legal responsibility, income which

is, in fact, sufficient only for the need of himself, Mrs. Bell and Cynthia Bell. Intervenor Haywood Bell stood at all times mentioned herein, and presently stands, ready to prove that he is not able to make available to intervenor Bolden children and Alberta Conrad that amount of income deemed available by defendants.

(T) By reason of defendants' actions, as set out more fully above, intervenors Bertha and Haywood Bell have been denied those rights of privacy and respose arising under the Third, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and are unlawfully forced to surrender their constitutional rights as a condition to the eligibility for AFDC benefits of the Bolden children and Alberta Conrad.

IV

Intervenors herein have no adequate remedy at law and unless defendants are enjoined by this Court, they will continue to suffer irreparable injury.

WHEREFORE, Bertha and Haywood Bell, John, Thomas, Patricia, and Rosemarie Bolden, and Alberta Conrad, intervenors herein, respectfully pray that answers be filed by defendants and pray that this Court:

(1) assume jurisdiction of this cause and convene a three-judge district court;

(2) enter a declaratory judgment pursuant to Title 28, U.S.C., §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring Section 11351 and the regulations promulgated thereunder violate:

(a) the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, in that they authorize and require the denial, reduction or discontinuance of AFDC public assistance to needy and eligible children on the basis of income assumed to be available from a not legally responsible man living with or married to said children's mother;

(b) the Fourteenth Amendment to the United States Constitution in that they deny Haywood Bell his property without due process of law; and

(c) Article IV, paragraph 2, and the Third, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution in that they deny Mr. and Mrs. Haywood Bell their constitutional rights to privacy and repose;

(3) enter a preliminary and permanent injunction restraining defendants, their agents, servants and employees, from enforcing California Welfare and Institutions Code, § 11351, and the State Department of Social Welfare regulations promulgated thereunder so that no child will be denied AFDC or have AFDC benefits reduced or terminated on the basis of income assumed to be available from a not legally responsible stepfather or Man Assuming the Role of Spouse (MARS); and

(4) allow intervenors their costs herein and grant them such additional or alternative relief as the Court may deem to be just and appropriate.

Dated: November 22, 1968.

/s/ STEVEN J. ANTLER
STEVEN J. ANTLER

[Notarized Verifications of Bertha Bell and Haywood Bell omitted in printing.]

EXHIBIT A (to Intervenors' Complaint)

DECLARATION

I, HAYWOOD BELL, say and declare that:

1. I married Bertha Bell on July 7, 1967. We are now residing together at 38 Gilroy Street, City and County of San Francisto.

2. My immediate family consists of myself, my wife and our child, Cynthia Bell, age 9. I am presently employed and am willing and able to support this family.

3. My wife has five other children: John Bolden, born January 26, 1952; Thomas Bolden, born January 19, 1953; Alberta Conrad, born January 10, 1958; Patricia Bolden, born March 22, 1955; and Rosemarie Bolden, born April 13, 1956.

4. I have never voluntarily supported my wife's other children and I do not intend to be responsible for their support. At the time I married Mrs. Bell, she was receiving AFDC and I married her with the understanding that public assistance would continue for her other children. Immediately following our marriage, AFDC payments did continue.

5. In March, 1968, the San Francisco Department of Social Services began to reduce the AFDC payments to my wife's children on the assumption that my earnings were available to support these children. This assumption was false and I sought legal advice and requested an administrative fair hearing to contest the welfare department's action.

6. Effective May 31, 1968, all AFDC payments were terminated. Because of the dire situation created by the cutoff of funds for the other five children, I have had to incur personal debts and not meet my own obligations (i.e., rent payments, union dues, car insurance, life insurance) to see that the other five children did not starve. The money I have spent on their behalf was only spent because of the emergency situation which resulted from the Welfare Department's action. I have not voluntarily supported these children, and I have not and do not now assume, in any way, the role of parent to any of them

or receive them into my family. I demand that all funds expended in their behalf be returned. I expect this result from the decision to be rendered in the pending fair hearing.

7. My wife is about to re-apply for an AFDC allowance for her five children to whom I am not related. I intend to and will terminate all payments for food and other necessities which I am now forced to provide as soon as a final decision has been made on her application.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed at San Francisco, California, this 21st day of August, 1968.

/s/ HAYWOOD BELL
HAYWOOD BELL

Motion to Dismiss Complaint and to Dissolve Three Judge Court and Return to Motion for Preliminary Injunction in Civ. Nos. 50238 and 50285

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

Defendants move this Court to dissolve the three-judge court which was convened pursuant to Title 28, United States Code, Sections 2281, 2284, for the reason that the three-judge court lacks jurisdiction because the complaint raises no substantial federal questions.

Defendants also move this Court, either as a three-judge court if the preceding motion is denied, or as a single-judge court following the dissolving of the three-judge court, to dismiss the complaint without leave to amend for the reason that the complaint fails to state a claim upon which relief can be granted.

In the alternative, defendants respectfully urge this Court to deny plaintiffs' motion for preliminary injunction for the following reasons:

1. The status quo should, and will, be preserved pending a final decision in this matter by a denial of the motion for preliminary injunction;
2. Plaintiffs have failed to establish such irreparable injury which, when compared with the countervailing irreparable damange to the public, can justify the granting of a preliminary injunction;
3. Plaintiffs have not shown the requisite probability of success on the merits of their cause of action.

If a preliminary injunction issues out of this Court, defendants request and urge that a good and sufficient security bond be required of plaintiffs to secure defendants if they subsequently prevail on the merits.

Attached hereto and made a part of this proceeding is a copy of the memorandum of points and authorities

filed in *Percy, et al.* v. *Montgomery, et al.*, Civil No. 50285, in this Court.

DATED: November 22, 1968.

THOMAS C. LYNCH
Attorney General of the
State of California

ELIZABETH PALMER
Deputy Attorney General

JAY S. LINDERMAN
Deputy Attorney General

RICHARD J. MOORE
County Counsel
County of Alameda

BEN H. ZUPPAN
Deputy County Counsel
County of Alameda

KEITH C. SORENSON
District Attorney
San Mateo County

JEROME F. COLEMAN
Deputy District Attorney
Attorneys for Defendants

[Memorandum of Points and Authorities and Certificate of Service omitted in printing.]

Memorandum Opinion (Original Filed Dec. 23, 1968, Clerk, U.S. Dist. Court, San Francisco)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 50238

GENEVER LEWIS, individually, and as general guardian of ANNETTE LEWIS and MANUEL LEWIS, and as representative of a class of unnamed plaintiffs similarly situated, PLAINTIFF

vs.

PAULINE STARK, ET AL., DEFENDANTS

Case No. 50285

MARGARET PERCY and MELVIN JONES, ET AL., PLAINTIFFS

vs.

JOHN MONTGOMERY, ET AL., DEFENDANTS

BEFORE: HAMLIN, U. S. Circuit Judge, and ZIRPOLI and WOLLENBERG, U. S. District Judges

MEMORANDUM OPINION

Plaintiffs seek in their own behalf and as representatives of their respective classes to have this court declare that section 11351 of the California Welfare and Institutions Code, and the related sections of the California Public Social Services Manual (PSSM), are contrary to federal regulations interpreting the Social Security Act and are unconstitutional.

The original plaintiffs in this action were Genever Lewis (Civ. No. 50238) and Margaret Percy (Civ. No. 50285). These plaintiffs sued on behalf of themselves, their children, a man assuming the role of spouse (MARS) in the Percy home, and all other individuals similarly situated. Motions to intervene were made prior to the date set for consolidated hearing, and those motions

brought before this court two families with a stepfather instead of a MARS, as well as a third family with a MARS. By virtue of the circumstances of the original plaintiffs and the intervenors, leave to intervene would appear mandatory, Fed.R.Civ.Proc. 24(a). Any findings of this court contrary to the interests of the MARS would apply a fortiori to the stepfather. For this reason the motions to intervene in No. 50285 are granted to Virginia Sims, Mary J. Garner, Bertha Bell and their minor children, and to Humberto Garcia and his minor child, and Haywood Bell. For this reason also this court will refer only to the claims raised by the MARS and will not treat separately the claims of the stepfather, as we deem it unnecessary to do so.

I

Introduction

The federal government maintains in cooperation with the states, a program of assistance to families with dependent children (AFDC). According to one provision of the controlling federal statute, the Social Security Act, "A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, as well as any expenses reasonably attributable to such income . . . ." 42 U.S.C. 602 (a)(7). The federal government and the state of California are in disagreement as to the proper method of taking "into consideration any other income and resources of any child" when there is present in the family a "man assuming the role of spouse." Regulations issued by the Department of Health, Education and Welfare in August, 1968 permit a state to take into account contributions from a MARS only if there is "proof of actual contributions".[1]

---

[1] 45 C.F.R. § 203.1:

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act to be approved under section 402 of such Act (42 U.S.C. 602), must

California proceeds differently. It obligates a MARS to support the children in the home if he is able. "/A/n adult male person assuming the role of spouse . . . . *is bound to support*, if able to do so, his wife's children if without support from such . . . adult male person they would be needy children eligible for aid under this chapter." Cal. Welf. & Inst. Code § 11351 (emphasis added).[2]

---

provide that the determination whether a child had been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2 (i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of *proof of actual contributions*. (Emphasis added).

[2] Section 11351 reads in full as follows:

"Where a needy child lives with his mother and a step-father or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such step-

The MARS ability is determined by the state according to established categories of allowable income and deductions. Under California's statute and regulations, the amount of assistance to the needy family is reduced by the amount of income which the state has computed to be available from the MARS.[3] Under the HEW regulations,

---

father or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, 'adult male person' means any male person of age 18 years or older."

[3] The statute is set forth in note 2, *supra*. The following regulations are contained in the Public Social Services Manual:

42-535 Responsibility of man assuming the role of spouse.

AFDC .1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.2 *Responsibility of Man Assuming Role of Spouse for Support*

The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

* * * *

44.133 Treatment of Income (Continued)

AFDC .5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

[Footnote continued on page 38]

the amount of assistance may be reduced only by the amount of proved contributions. Thus the situation can arise in California where the state will regard the family to be living on money which the MARS is actually spending for purposes not recognized by the allowable deductions (living expenses, job-related expenses, court-ordered

---

* [Continued]

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all the children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the AFDC assistance standard for the family consisting of the members of the FBU, the unmarried father or man asuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, here is no income to the FBU. His children are needy and may qualify for AFDC as a separate case if his income is less than the need.

child support payments and medical care). Therefore, despite the presence in the home of a MARS earning sufficient income to support the family, the family may still be in actual need. Under the HEW regulations the family is considered needy; under California law it is not.

Plaintiffs representing mothers, children, stepfathers, and MARS in families whose assistance has been modified under California's statute and regulations cite the HEW regulation, and the equal protection clause, the due process clause, and the right to privacy as bases for overturning the California practice to which they object. Plaintiffs seek a temporary order restraining the enforcement of the California budgetary rules, and declaratory and injunctive relief. This three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284, and jurisdiction rests on 42 U.S.C. § 1983. Defendants have moved to dissolve the three-judge court for lack of a substantial federal question and to dismiss the complaint without leave to amend for failure to state a claim.

II

HEW Regulations

Plaintiffs contend that the HEW regulations must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

The HEW regulations, however, bar from state consideration resources controlled by a MARS. It is just these resources that California takes into account under Welf. & Inst. Code § 11351. The statute obligates the MARS to support the children in the home to the extent he is

able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression mandate, are, in the view of this court, invalid. They exceed the Secretary's authority to make "rules and regulations not inconsistent with" the Social Security Act, 42 U.S.C. § 1302. The Secretary has, of course, the "power to fill up the details" *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77, 85 (1932), but he is nevertheless "required to follow Congressional mandate, whether explicit or ascertainable in underlying policy." *United Steel Workers of America* v. *N.L.R.B.*, 390 F.2d 846, 851 (1968). The Supreme Court recently articulated the underlying policy by saying "that Congress expected 'breadwinners' who secured employment would support their children. This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was *legally obligated* to support his children." *King* v. *Smith*, 392 U.S. at 329, (emphasis added). The HEW regulation, by requiring proof of actual contributions from a MARS, reduces the expectation of Congress to a mere hope. California, on the other hand, shares the congressional expectation. By creating a rule out of harmony with the enabling statute, HEW has created a mere nullity. *Manhattan General Equipment Co.* v. *C.I.R.*, 297 U.S. 129, 134 (1936). California, therefore, is not in conflict with any valid federal law.

In addition to upholding the California practice for the reason that the HEW regulation violates the policy of the Social Security Act, this court also finds that the regulation, by dictating to the states the manner in which they shall consider income and resources, intrudes upon an area reserved by federal law and policy to the states. As the Supreme Court has noted, the "AFDC program is based upon a scheme of cooperative federalism." *King v. Smith*, 392 U.S. at 316. Under this scheme, the states have the sole responsibility for determining the standard of economic security. Moreover, the legislative history of the Act makes clear that the States have the sole power to determine who is needy. *Id.* at 319 n.14. As one Representative said during the floor debates, "need is to be determined under the State law." *Id.* at 319 n.14. California has simply exercised the power that Congress intended the states to have. It is not for the Secretary to prohibit California from; (a) statutorily imposing an obligation of support on the MARS to the extent of his ability; (b) determining that to this extent the child is not needy; and (c) reducing the child's assistance accordingly. As the Supreme Court has pointed out, this authority was intended for the states prior to the Act's passage and has been reserved to the states by § 402(a) of the original Act, carried forward without change in this respect to the present day. 42 U.S.C. § 602(a) (1967 Supp.)

III

Equal Protection

Plaintiffs claim that the challenged provisions of California's welfare program deny equal protection to two classes: (1) needy children who reside with a MARS, and (2) the MARS himself. The thrust of plaintiffs' objection is that the classifications drawn by the legislature are not reasonably related to the purposes of the statute, and that it is unconstitutional to impose on the children and the income-earning MARS in a family receiving AFDC payments a burden that is not imposed on AFDC children without an income-earning MARS or on a MARS living with a nonAFDC family.

In resolving conflicts turning on equal protection, this court is guided by the content given to the equal protection clause by the United States Supreme Court. In *Morey* v. *Doud*, 354 U.S. 457, 463-64 (1957), the Court offered four rules for testing discrimination in social legislation. First, the equal protection clause does not deprive the states of a "wide scope of discretion", and a statute having a reasonable basis will be upheld. Second, a failure of "mathematical nicety" or the creation of "some inequality" is not offensive to the equal protection clause. Third, a classification will be sustained "if any state of facts reasonably can be conceived that would sustain it." Fourth, the burden is on the attacker to show no reasonable basis. This test has been applied to strike down a state statute excepting a named company from state regulation, *Morey* v. *Doud*, *supra;* to strike down a state rule prohibiting illegitimate children from bringing a wrongful death or survival action for the death of their mother, *Levy* v. *Louisiana*, 391 U.S. 68 (1968); and to strike down a state rule selectively prohibiting the mother of an illegitimate child from recovering for injury or death to the child in some circumstances but not in others, *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). The Supreme Court could find no possible rational basis for these legislative classifications.

Turning to the contentions raised by plaintiffs in the present case, this court first finds that there is no discrimination of any sort in regard to the AFDC children. Plaintiffs complain that the mere presence of the MARS puts the children in an "inferior status", and seek vindication by making an analogy to the *King* case. Plaintiffs' line of argument is erroneous for the reason that the modification of assistance takes place equally for all AFDC children if they have other resources available to them. Children in a MARS family are not discriminated against. They receive equal treatment with all other children receiving AFDC assistance.

Plaintiffs' analogy to the *King* case and characterization of the California practice as a subtle version of Alabama's statute are highly inaccurate. In *King*, the

man found by Alabama to be a substitute father lived with his own family and made no income or resources available to the supposed "substitute" child and its mother and clearly had no ability to contribute to their support. Worse, the Alabama regulation made deprived children ineligible for aid due solely to the sexual conduct of their parent. Thus, the *King* case raised "only the question whether the State may deal with these problems [of immoral conduct and illegitimacy] in the manner it has here—by flatly denying the AFDC assistance to otherwise eligible dependent children." 392 U.S. at 320.

This case is quite different. Here we have a California statute and regulations which deal with a man who actually is "in or around the home" and either assumes financial responsibility or represents himself to the community as the husband or father, not one who, as in *King*, had an occasional rendezvous with the mother. More importantly, California does not disqualify otherwise eligible needy families for aid because of the mother's sexual behavior; it simply considers the man's income in computing the welfare grant. It provides for a reduction of payments to the extent the man has *actual* ability to support.[4] The state of California does not reduce welfare grants because of the frequency of sexual relations or the presence of illegitimate children, but because of the actual presence of a breadwinner in the home of the applicant or recipient of aid. That breadwinner must, if able to do so, support his "adopted" child.[5]

Thus, California, unlike Alabama, does not deny or modify AFDC grants to "destitute children who are legally fatherless . . . on the transparent fiction that they have a substitute father." 392 U.S. at 334. California determines whether a legally fatherless child is destitute before granting, limiting or denying aid, and that determination includes the 'reasonable' inquiry whether the child has a MARS to look to for support which the state obligates him to provide.

---

[4] See note 3 *supra*.

[5] See note 2 *supra*.

This court can easily conceive of rational purposes that justify the modification of assistance in light of a MARS' net income. To the extent that the number of beneficiaries and the amount of their assistance can be reduced according to their administratively determined need, it may be possible to increase the amount of assistance to other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations. Also, it is certainly permissible for any program of government spending to minimize expense where possible, and the net income of a MARS living with recipient children is a rational incident for such expense minimization.[6]

It is not invidious for the legislature to eliminate the financial bonus that would, in the absence of California budgetary rules, accrue to unmarried couples receiving AFDC benefits. In the absence of the obligation imposed by Welf. & Inst. Code § 11351, a MARS could engage in all aspects of family life while shifting the expense of supporting the children in the home from himself to the state. By imposing the support obligation on the able MARS, the state was justifiably eliminating this evasionary device.

Moreover, in cases where the AFDC child's natural father has established a new family, the legislature was making the socially advantageous choice of permitting the natural father to devote his resources to his new family so long as the MARS is able to provide support for the AFDC family.

In this context, the court is unable to say that California acts toward AFDC recipients in a MARS family in a way that is invidiously discriminatory. *Levy* v. *Louisiana*, *supra*. The plaintiffs have failed to discharge their burden of showing that the California budgetary rules have no reasonable basis. We therefore find that the program for assistance modification does not deny AFDC children equal protection of the laws.

Plaintiffs' second argument that the MARS is denied equal protection is likewise without merit. Plaintiffs

---

[6] *See* Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 775-76 (1966).

contend that, because the support obligation of a MARS exists only for children receiving AFDC assistance, the MARS in a welfare family is treated differently from a MARS in a non-welfare family. This contention is of course true, but it is also irrelevant. The obligation imposed on the MARS in an AFDC family is part of a comprehensive pattern of child-support statutes directed variously at natural parents, Cal. Civ. Code §§ 137, 137.1, 137.2, 139, 143, 196, 196a, 199, 230, and Cal. Pen. Code § 270; adoptive parents, Cal. Civ. Code § 228; and stepfathers and men assuming the role of spouse, Welf. & Inst. Code § 11351. These obligations differ according to need and to the nature of the "parental" relationship. To be sure, a MARS in a non-AFDC family is free of support obligation. But this court cannot say that the "discrimination" against the MARS in the AFDC family results from a distinction that has no relevance to the purpose for which the classification was made. *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966). It is not invidious for the legislature to recognize that in a society of many cultures and many impoverished individuals, perfectly stable, though informal, families will inevitably arise.[7]

This court is not unaware that the state's policy may induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the MARS. Men who respond to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence. Nevertheless, this court cannot say that the California legislature has been wholly arbitrary in incurring this risk. As some commentators have observed, the only employable males likely to be thus influenced to forsake their "families" would be "(1) those who would rather use their own income on themselves to the exclusion of their families, and (2) those who would be tempted to desert their fami-

---

[7] tenBroek, *California's Dual System of Family Law (III)*, 17 Stan.L.Rev.614, 617-19 (1965).

lies simply because the taxpayers' contribution to the family's income is eliminated." [8] This court cannot say that California has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners. To be sure, "any policy is likely to produce some undesirable side effects",[9] but we believe that these consequences are within the boundaries of the equal protection clause. Plaintiffs' second objection, therefore, must fail.

IV

Due Process

Earlier in this opinion, we mentioned the possibility that California will regard a family seeking AFDC assistance as living on money deemed available from the MARS even though actually put to other uses. This situation arises where the MARS makes expenditures that are not covered by the state-allowed deductions for living expenses, job-related expenses, court-ordered child support payments, and medical care. Money spent for other, non-deductible, purposes is deemed by the state to be net income available to the family. Under Welf. & Inst. Code § 11351, such net income is required to be applied to the needs of the family. To the extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the reduction though the MARS fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis

---

[8] Lewis & Levy, *supra*, note 6, at 779-80.

[9] *Id.* at 776.

of those nonexistent facts. Yet closer analysis entirely dispels the persuasiveness of plaintiffs' claim.

First, we repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. Welf. & Inst. Code § 11351. We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made.[10]

Second, we conclude that even if the available deductions have been too narrowly drawn to suit the preferences or style of life of some MARS, the effort to enlarge these categories must be directed to the legislature, not the courts. The days are over when the due process clause may be used to strike down state laws thought "unwise, improvident, or out of harmony with a particular school of thought". *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). We admit that the assumption of available resources will accurately reflect the facts for one particular family but not for another. Similarly, however, the restriction of certain optical practices to licensed ophthalmologists or optometrists will accurately reflect the ability of one particular unlicensed person but not of another. *Williamson, supra.* Again, permitting only practicing lawyers in the state to engage in "debt adjusting" may accurately reflect the abuse that would otherwise be imposed on distressed debtors by one particular nonlawyer, but not by another. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). In light of these Supreme Court decisions upholding irreversible determinations as to the undesirability of allowing unlicensed persons and nonlawyers to engage in certain activities, this court

[10] tenBroek, *supra*, note 7, at 657.

must uphold over due process objections, California's irreversible determination that a MARS' net income, as computed by the state, is available to AFDC recipients.

V

Right of Privacy

Plaintiffs' final contention is that enforcement of the state's budgetary rules violates a MARS' right of privacy. We agree that the state's program may intrude into the private life of the MARS to determine whether he is maintaining an intimate relationship with the mother and to ascertain his financial status. We also agree that the "notions of privacy surrounding the marriage relationship" protect that relationship from certain intrusions. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Nevertheless, plaintiffs have failed to demonstrate that the practices of the state would be shown at trial to resemble the methods necessary to prove use of contraceptives, which methods were firmly rejected as "repulsive" by the Supreme Court. Proof of an intimate relationship, as required by the California regulations, is a far different matter, and does not require nearly so extensive or detailed an inquiry into the practices of the man and woman. California's regulations therefore fall without the "zone of privacy" recognized in *Griswold* and are not unconstitutional. What we have just said about the inquiry into "intimate relationship" applies a fortiori to the inquiry into the MARS' finances, an inquiry little different from that required for the enforcement of federal and state taxation. This fourth contention of plaintiffs must therefore fail.

VI

California's budgetary rules obligate a man assuming the role of spouse to contribute his income, to the extent that he is able, to an otherwise needy AFDC family. To the extent of the MARS' administratively determined ability, the grant to the AFDC family is reduced. Although this practice conflicts with a recent HEW regu-

lation requiring proof of actual contributions, we sustain it because we find the HEW regulation to be inconsistent with the language and policy of the Social Security Act, an unfounded intrusion into a province reserved by the Act and its legislative history for the states, and therefore invalid. We further find that California's practice is not prohibited by the equal protection or due process clauses of the constitution, or by the right to privacy announced in *Griswold* v. *Connecticut*. We therefore find that plaintiffs have not, under color of any state statute, been deprived of any rights secured by the constitution, and that this complaint seeking relief under 42 U.S.C. § 1983 must be dismissed for failure to state a claim upon which relief can be granted. The motions to intervene having been granted, this dismissal is effective as to both the original plaintiffs and the subsequent intervenors.

The dismissal of the complaint renders unnecessary consideration of any of plaintiffs' motions for relief.

In view of the disposition of plaintiffs' claims, this three-judge court is hereby dissolved.

Dated: December 19, 1968.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

Motion to Vacate Memorandum Order Dismissing Complaint and Dissolving Three Judge Court and Motion for Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing.]

TO: OLIVER J. HAMLIN, U.S. Circuit Judge
ALFONSO J. ZIRPOLI, ALBERT C. WOLLENBERG, U.S. District Judges

Plaintiffs hereby move this Court to vacate its Memorandum Order filed on December 23, 1968. Plaintiffs further move for an order resetting this cause for argument and trial with proper notice to all parties and to the United States Department of Health, Education, and Welfare (HEW).

This motion is based upon the papers of all parties previously filed herein and upon the exhibits attached hereto. Plaintiffs submit this motion to the Court for decision by the Court ten (10) days after service upon attorneys for defendants without oral argument unless the Court deems such argument necessary and sets the motion for hearing.

Plaintiffs respectfully call the Court's attention to footnote 16 in *King* v. *Smith*, 88 S. Ct. 2128, 2134 (1968), which reads as follows:

> "Indeed, the Act requires that in determining need the state agency 'shall * * * take into consideration any other income and resources of any child or relative claiming aid to families with dependent children * * *.' 42 U.S.C. § 602(a) (7). Regulations of HEW, *which clearly comport with the statute*, restrict the resources which are to be taken into account under § 602 to those 'that are, in fact, available to an applicant or recipient for current use on a regular basis. * * *' This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual." (Emphasis added.)

Plaintiffs urge that this Court reconsider its decision as its determination is directly contrary to the position

of the Supreme Court as expressed in the quoted footnote.

Plaintiffs further urge that the Court consider the letter dated December 13, 1968, from Alanson W. Wilcox, General Counsel, HEW (attached hereto as Exhibit B), which provides a full explanation of federal policies regarding treatment of "income and resources" of Aid to Families with Dependent Children (AFDC) recipients. The letter was not available to the Court at the time of its decision, as it was not received from HEW until December 20, 1968, one day after the Court rendered its decision.

Plaintiffs also attach hereto as Exhibit A a copy of a memorandum submitted by the Attorney General on behalf of defendant John C. Montgomery (Montgomery) in the case of *McPherson* v. *Montgomery*, Civ. Act. No. 46759 (N.D. Cal., June 24, 1967), as well as the Order of the Court dismissing plaintiff's complaint therein. In *McPherson* the Court was told by defendant Montgomery's attorney that:

> "The basic thrust of the complaint in the instant matter is with respect to regulations of the Department of Social Welfare which permit the Department and its agents (the county welfare departments) to treat income as available to an applicant for aid and her dependents even when that income is not in fact available. The reasonableness of plaintiffs' complaint on this issue has been recognized by both the U.S. Department of Health, Education, and Welfare and the State Department of Social Welfare."

Based on defendant Montgomery's acceptance of the requirement that income and resources must be actually available, the Court rendered its decision.

For the reasons stated above, plaintiffs' motions should be granted.

Dated: January 2, 1969.

Respectfully submitted,

/s/ STEVEN J. ANTLER
STEVEN J. ANTLER

[Exhibit A omitted in printing.]

EXHIBIT B (to Motion to Vacate, etc.)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

[SEAL]

Office of the
General Counsel

Dec 13, 1968

Mr. Thomas K. Gilhool
Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Dear Mr. Gilhool:

This is in reply to your inquiry concerning our interpretation of the amendment to section 402(a)(7) which was made by the Social Security Amendments of 1967. More specifically you state that various questions have arisen in connection with proceedings concerning State substitute father and stepfather provisions, and you request clarification of our policy with regard to the amended income and resources provision of the statute, and its relationship to this Department's regulations on "Deprivation of Parental Support or Care", 45 CFR Part 203 (33 Fed. Reg. 11290, August 8, 1968) and on "Need-Requirements for State Public Assistance Plans." Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968). Perhaps the clearest and most orderly way to answer your questions is to detail the development of these provisions in chronological order.

The basic issue here revolves around what is known as the "essential person" policy. It has been the long-standing policy of this Department (and its various forerunners) to permit States to include, in computing the needs of a person eligible for any of the categories of financial assistance, the needs of another person (or persons) living in the same home whose presence is essential to the well-being of the recipient. Such an essential person

is not a "recipient"; to gain that status he must be eligible in his own right. Rather, the theory is that part of the recipient's need is to have the essential person present in the home, and thus the financial cost of achieving this result can be considered as part of the recipient's need.

The common sense of this policy becomes apparent upon citing a few examples.

In order to be eligible for old-age assistance, an individual must be 65 years of age or older. Consider a 65 year old man, whose wife is only 62. There can be no doubt that the continued presence of his wife is essential to the recipient's well-being, and thus the States are permitted to include her subsistence needs in computing the recipient's budget.[1]

Similarly, assume the case of a child and his mother. If there is another child in the family who is older than the State's limit for the eligibility of dependent children, he cannot qualify as a recipient. However, a State may consider that the continued presence of siblings in the home is essential to the well-being of the younger child and serves to strengthen family life, and thus may include their needs in the family budget. These siblings are not recipients, but their needs are met.

As the other side of the coin, when the needs of an essential person are included in the family's budget, the Federal agency has alway required that all income and resources of that person must also be considered as part of the family assets in determining their total need, in

[1] Several of the formulas under the Social Security Act for computing the amount of Federal funds payable to the States are set forth in terms of the number of recipients and the total amount of payments under the State plan. In our example, there would be only one recipient (the husband); but the total payment under the State plan to meet his needs and those of his wife would be counted. The essential person concept was thus accommodated to the provisions of the Social Security Act, although prior to the 1967 Amendments the Act did not contain any direct reference to the essential person.

the same way that all income and resources of a recipient are considered, in accordance with the requirements of the Act.

The State has the option of recognizing essential persons, and if it does so, must describe in its State plan the classes of persons who will be so included (such as spouses, siblings, etc.). Unrelated individuals living in the home may be included as essential persons. However, the choice must be left to the applicant or recipient as to whether a nonrecipient living in the home will, in that individual case, be included as an essential person. If an older brother is living in the home and has a certain amount of earned income which he spends on himself, the family may not want him included because inclusion of his income would mean that all his income would be deducted from the family's budgeted needs even though not actually available to the rest of the family. Of course, even if he is not included as an essential person, all amounts which he actually contributes to the family must be considered by the State agency as part of the child's or caretaker relative's income and resources.

Thus, prior to the Social Security Amendments of 1967, the Federal policy setting forth the requirements for State plans provided as follows:

> "If a State chooses to establish the need of an individual on a basis that recognizes as essential to him the presence in the home of other needy persons, the plan must include the State's policy as to the persons whose need will be comprehended in the individual's need. The State's instructions must set forth clearly that the decision as to whether any persons within the State's definition are essential to his well-being shall rest with the recipient." Handbook of Public Assistance Administration Part IV-3131, item 4.

Congress in considering the 1967 amendments to the Social Security Act, was fully aware of this essential person policy (as will be indicated below). However, they preferred to have this policy made express in the statute.

There were several reasons for this decision. For one thing, some States make sizeable expenditures in connection with the needs of the essential person and it would seem appropriate for this reason alone to establish an express statutory base. Also, it was necessary to make reference to the essential person in order to achieve certain other results, including, under AFDC, the exemption of earned income (§ 402(a)(8)), the provision of services (§ 402(a)(14)) and where appropriate, the development of a plan for employment and referral to the Work Incentive Program (§ 402(a)(15), (19)) and, in general, to integrate the essential person more fully into all aspects of the public assistance program.

Section 402(a)(7), prior to the 1967 amendments, required that the State agency take into consideration the income and resources of any child or relative claiming aid to dependent child (subject to a few specific exceptions which are not relevant here). The language of this provision was amended so that it now reads, in pertinent part:

> "§ 402(a). A State plan . . . must . . . (7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid . . .*" (Amendment underscored.)

Therefore, the statute now explicitly requires that the income and resources of the essential person, that is, the individual whose needs are included in the family budget, must be considered as available to the family in the same fashion as income and resources of a child or relative claiming aid to families with dependent children.

The Report of the Committee on Ways and Means, where this amendment originated, describes the new provision and states that it "makes no change in present law."

H.R. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967). Thus, it seems perfectly clear that Congress was fully aware of the "essential person" policy, had no intention of changing it, and was merely making express provision for an administrative interpretation of longstanding. We therefore consider all aspects of our policy in this area as unchanged by the amendment and fully applicable to all States. In this light, the reference in section 402 (a) (7), as amended, to "any other individual . . . whose needs the State determines should be considered" relates to the State's option of recognizing essential persons or not, and of designating the classes of persons who will be so recognized. It does not change the prior-existing Federal rule that the applicant or recipient has the choice as to whether any particular individual will be recognized as an essential person.[2]

The clear intent of the statute is reflected in the implementing Federal regulations, which set forth the essential person policy without substantive change, as follows:

> "A State plan . . . must . . .
>
> "6. If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals,

---

[2] There has been some confusion about the unchanged provision in section 402(a) (7) whereby the State must "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." This refers to the individuals who are considered recipients in the particular case, as contrasted with essential persons. Moreover, claiming aid is voluntary with the claimant. The definition of "relative with whom any dependent child is living" under section 406 indicates which relatives, including stepparents, may be considered as recipients of AFDC for purposes of Federal financial participation. In any particular case, however, which relative is considered to be a recipient depend on the child's circumstances, and who claims aid. In the ordinary case involving a stepparent, only the children and the mother are considered to be recipients, i.e., "claiming aid"—in most situations, only one relative may be counted as a recipient—and the stepfather is inlcuded, if at all, as an essential person.

(i) Specify the persons whose needs will be included in the individual's need, and

(ii) Provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient." Regulations on "Need—Requirements for State Public Assistance Plans," item 3.B.6, Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968).

These regulations were announced, with binding effect on the States, on May 24, 1968, prior to the decision of the U. S. Supreme Court in *King* v. *Smith.*

The regulations also provide that, in the consideration of income and resources, only such net income as is actually available for current use on a regular basis will be considered, but that income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21. Items 3.C.2 (i) and (iii) and 3.C.6(ii) (33 F.R. 10230, July 17, 1968). With respect to children, therefore, income of a relative other than a "parent" could not be assumed, but would be considered only if actually used for the children.

Prior to the decision of the U. S. Supreme Court in *King* v. *Smith,* the regulations were applied in the light of State "substitute father" rules. Some States with such rules made children totally ineligible because of a stepfather or other substitute father, while other States with such rules assumed the income of the substitute father and allowed the family to be eligible for needs beyond that income. Such assumption of income was tolerated by the Federal agency, even though otherwise contrary to the Federal regulations, only because it was viewed as the application of a substitute father rule, albeit one which did not automatically make the family completely ineligible for AFDC.

When the decision in *King* invalidated State substitute father rules, there was no basis for the Federal agency to apply its regulations relating to non-assumption of income in any way other than as written. It should be particularly noted that the Supreme Court was mindful

of these regulations and stated that they "clearly comport with the statute." 88 S. Ct. 2128, 2134, n. 16 (1968).

We look, then, to the Department's regulation on "Deprivation of Parental Support or Care." 33 F.R. 11290 (Aug. 8, 1968). Section 203.1(a) provides that the determination pertaining to deprivation of parental support or care may only be made with respect to a child's natural or adoptive parents, or with respect to a stepparent only where he is "legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." Subsection (b) then specifically provides that the inclusion in the family or presence in the home of a person other than those described in subsection (a) "is not an acceptable basis . . . for assuming the availability of income by the State" and "the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions."

Thus, a State may not automatically assume that any or all of the income (or any other resources) of a stepparent (other than one with support obligations as set forth in the regulation) or other "substitute parent" is available to the family; only actual contributions which he makes may be considered. However, the State may classify stepfathers or other related or unrelated individuals living in the home as essential persons under its plan, subject

---

[3] This limitation on stepparents, with respect to whom the State may determine deprivation of parental support or care, is required by the court's decision in *King* v. *Smith*. The court specifically concluded that "parent", as that term is used in title IV of the Social Security Act, includes only persons with a State-imposed legal duty to support the child for whom assistance is sought. The reasoning of the opinion clearly supports the further restriction that the State law imposing the same obligation as is borne by the natural parents. To permit a special lesser duty to be established for stepfathers or other substitute fathers of children on public assistance (or children who are poor) would be an obvious circumvention of the law as interpreted by the Supreme Court.

of course to all the related policy on this subject described above. If this were done, the result would be that the child's relative could decide to have the substitute parent considered in the family unit. The State would then be required by section 402(a)(7) to consider (i.e. treat as available to the family) the income and resources of the substitute parent, but it would also be required to consider his needs in determining the total family budget. As stated above, however, the decision as to whether an individual shall be treated as an essential person, in any individual case, must be made by the recipient. Thus, any State which makes the inclusion of the essential person mandatory is clearly acting in a fashion inconsistent with the established essential person policy, the statute as we interpret it, and with the Department's regulations on deprivation of parental support and care and its regulations on need.

I hope the discussion has clarified for you the relationship of the Department's policies on essential person and nonassumption of income, and the result of their application to the "substitute father" situation. We believe that the Federal regulations as here explained, are not merely supported but quite clearly required by the current provisions of section 402(a)(7) of the Social Security Act and the Supreme Court's decision in *King* v. *Smith*.

Sincerely yours,

/s/ ALANSON W. WILCOX
General Counsel

Order Denying Motion to Vacate and Motion for Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 50238

GENEVER LEWIS, ET AL., PLAINTIFFS

v.

PAULINE STARK, ET AL., DEFENDANTS

Civil No. 50285

MARGARET PERCY, ET AL., PLAINTIFFS

v.

JOHN MONTGOMERY, ET AL., DEFENDANTS

ORDER DENYING MOTION TO VACATE MEMORANDUM ORDER DISMISSING COMPLAINT AND DISSOLVING THREE-JUDGE COURT AND MOTION FOR REHEARING

This cause having come on to be heard on March 7, 1969, on plaintiffs' motion to vacate memorandum order dismissing complaint and dissolving three-judge court and motion for rehearing, and the court having heard argument of counsel, and being fully advised, it is

ORDERED that the motion be and the same hereby is denied.

Dated: March 12, 1969.

/s/ O. D. HAMLIN
United States Circuit Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 560 Misc., October Term, 1969

GENEVER LEWIS ET AL., APPELLANTS

v.

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be and the same is hereby, granted.

November 10, 1969

SUPREME COURT OF THE UNITED STATES

No. 560 Misc., October Term, 1969

GENEVER LEWIS ET AL., APPELLANTS

v.

JOHN MONTGOMERY, Director of the State Department of Social Welfare of the State of California, ET AL.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 829 and placed on the summary calendar.

November 10, 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 372101 395